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IN THE

Supreme Court Of The United States

October Term, 1982

LARRY BENNETT, JR., JOHN E. VICKERS, DR. MARION CARROLL, DR. THOMAS F. STATON, J. LOUIS WILKINSON, W. S. HAMNER, JOE OLIVER, JOE RAINES, and JUDSON C. LOCKE, JR.,

Petitioners,

v.

BOBBY WILLIAMS,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT L. WIGGINS, JR.
716 Brown-Marx Building
Birmingham, Alabama 35203
(205) 252-4065

Counsel for Respondent.

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STATEMENT OF THE CASE

The petition for certiorari inadequately describes the salient factual and procedural events in this case.

The plaintiff, Bobby Williams, was sentenced to prison at the age of seventeen and had been there for approximately one year before the events which are the subject of this case occurred on January 10, 1978. On that day the plaintiff was sleeping on his dormitory bunk in Holman Prison shortly after he had eaten lunch. (Tr. 645). While he slept, another inmate, Larry Cook, borrowed a sharp-

ened butter knife from an inmate in the kitchen and proceeded down the main corridor of the prison toward the plaintiff's dormitory. (Tr. 354, 348). He was not searched after leaving the kitchen or during his walk through the corridor, even though the defendant officials admitted that such searches are mandatory every time an inmate leaves the prison kitchen. (Tr. 349-350). As Mr. Cook walked down the corridor he searched for the presence of any guards in or around the plaintiff's dormitory and entered the dormitory when he did not see any guards. (Tr. 350). He walked around the plaintiff's bed to make sure he was sleeping and then went back out to the main corridor to make sure there were no guards in the area. (Tr. 350). He admitted that he did not want any guards to see him when he killed the plaintiff. (Tr. 350-351). He then returned inside the dormitory, walked straight to the sleeping plaintiff and began stabbing him with the sharpened butter knife. (Tr. 351). He stabbed the plaintiff at least 27 times in all parts of his upper body[1] and then left him unconscious in a bed of blood. (Tr. 344). After doing so, he walked over to a group of inmates who had assembled some distance away and "asked" them to leave the plaintiff unattended and without assistance. (Tr. 344-345). He testified that it was his intent to kill the plaintiff and

[1]As a result of the attack by Mr. Cook, the plaintiff received twenty-seven stab wounds. (Tr. 459). Approximately twelve of these wounds were of a penetrating nature while the others were cuts and lacerations. (Tr. 70-74). The penetrating wounds were to the neck, back and chest causing lacerating injuries to the aorta, innominate veins, carotid artery and vertebral artery. (Tr. 77-78). Mr. Williams arrived at the Emergency Room of Greenlawn Hospital in Atmore, Alabama with only an occasional gasping breath and no blood pressure. (Tr. 86). He survived the wounds, but as a result of them, his spinal cord was severed causing total quadriplegia. (Tr. 458, 461). He spent almost all of 1978 in various hospital facilities. He has been in and out of the hospital since that time. (Tr. 494-495). The quadriplegia has caused total loss of use of his arms and legs, loss of bowel and bladder control, inability to perform sexual functions and total dependency on others for his daily care. (Tr. 461-462).

that he did not want anyone to aid the plaintiff in any way. (Tr. 344-345). One of the inmates eventually summoned defendant Raines, who was the Acting Captain of the Guards. (Tr. 248). Larry Cook testified that the first guard arrived about five minutes after he had left the plaintiff to die. (Tr. 353).

The defendants admit that there were no guards inside or outside of the dormitory where the plaintiff slept on January 10, 1978. (Tr. 113, 133, 243-244, 250-251, 334). This was not an isolated occurrence. The defendants admitted that they had never stationed a guard on the inside of the dormitories and stationed guards in the protective observation cubicle outside the dormitory only on an irregular basis.[2] (Tr. 283, 111, 268).

In January, 1976, after a lengthy trial, then District Judge Frank Johnson entered a decision in the case of *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *affirmed with modifications sub nom., Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied in relevant part, sub. nom., Alabama v. Pugh*, 483 U.S. 781, 98 S. Ct. 3057, 56 L. Ed. 2d 1114 (1978) (App. 70a - 180a). In that decision the district court found that incarceration in Holman Prison constituted cruel and unusual punishment. Among other things, the court in *Pugh, supra*, found that:

> Violent inmates are not isolated from those who are young, passive or weak. Consequently, the latter inmates are repeatedly victimized by those who are stronger and more aggressive. Testimony shows that robbery, rape, extortion, theft and assault are everyday

[2]The refusal to station guards both inside and outside the dormitory in which the plaintiff slept was a direct violation of an injunction which was entered in January, 1976 in *Pugh v. Locke, supra* at 333 (App. 146a). That injunction required that "guards shall be stationed inside living areas, including dormitories at all times." *Id.* at 333. (App. 146a). It also required that "[t]here shall be at least one guard inside, and one guard outside, all living areas at all times". *Id.* (App. 146a).

occurrences among the general inmate population. Rather than face this constant danger, some inmates voluntarily subject themselves to the inhuman conditions of prison isolation cells.

* * *

In view of the foregoing, the rampant violence and jungle atmosphere throughout Alabama penal institutions are no surprise. The evidence reflects that most prisoners carry some form of homemade or contraband weapon, which they consider to be necessary for self-protection. Shakedowns to remove weapons are neither sufficiently thorough nor frequent enough to significantly reduce the number of weapons. There are too few guards to prevent outbreaks of violence, or even to stop those which occur.

* * *

The conditions in which Alabama prisoners must live, as established by the evidence in these cases, bear no reasonable relationship to legitimate institutional goals. As a whole they create an atmosphere in which inmates are compelled to live in constant fear of violence, in imminent danger to their physical well being, and without opportunity to seek a more promising future.

* * *

Prison officials are under a duty to provide inmates reasonable protection from constant threat of violence. ***

The defendants in these cases have failed to carry out that duty. The evidence establishes that inmates are housed in virtually unguarded, overcrowded dormitories, with no realistic attempt by officials to separate violent, aggressive inmates from those who are passive or weak. The tension generated by illness and deplorable living conditions contributes further to the ever-present threat of violence from which inmates have no refuge. *Id.* at 406 F. Supp. at 324-330. (App. 115a - 133a).

Approximately one year after the entry of these findings and the injunctive remedies which they prompted, the plaintiff was incarcerated in Holman Prison by the defendants in this action. The prison conditions to which he was subjected were unchanged from those condemned as cruel and unusual the year before in *Pugh, supra.* This was clearly established by Judge Johnson in findings of fact entered in *Pugh*[3] concerning the continuing pattern of rampant violence in unguarded dormitories between 1976 and September, 1978. *Newman v. State of Alabama,* 466 F. Supp. 628 (M.D. Ala. 1979). After reviewing all of the evidence on the conditions of Holman Prison and other prisons between 1976 and 1978, the Court in *Pugh* and *Newman* found:

> In September, 1978, hearings were held to determine the degree of compliance by the Board of Corrections with the *Newman* and *Pugh* orders. The overwhelming weight of the evidence presented at that time established that what was true in 1972 and 1976 is still true today. While some progress has been made, the Board of Corrections has not in several critical areas achieved substantial compliance with the Court's orders. The very fact of confinement in the Alabama Penal System continues to contravene the Eighth and Fourteenth Amendment rights of plaintiffs.
>
> * * *
>
> Further, the Court concludes from the evidence that robbery, rape, and assault remain everyday occurrences among the general prison population in Alabama. The dormitories particularly are still places of fear and vio-

[3]The defendant – petitioners have failed to include the 1979 findings of fact in *Pugh* and *Newman* in the Appendix to their Petition. These findings were relied upon by the Court of Appeals in considering whether *Pugh* should be given the effect of collateral estoppel in this case. *Williams v. Bennett,* 689 F.2d 1370, 1375 (11th Cir. 1982) (App. 8a - 9a). The defendant – petitioners' Appendix is inadequate without inclusion of the 1979 findings of fact of Judge Johnson in *Pugh* and *Newman.* A copy of such findings is attached to this Brief and is reported at 466 F. Supp. 628 (M.D. Ala. 1979).

lence. Defendants admit non-compliance with the requirement that guards be stationed in the living areas, including dormitories. The dormitories, they say, are too dangerous for the guards to enter. That fear is well taken. The number of reported incidents of prosecutable crimes of violence shows a steady increase over the last four years. And it is axiomatic in the prison setting that the number of unreported crimes far outnumbers those which are reported.

The Board has not taken the first steps to curb this pattern of violence which makes a mockery of the Eighth Amendment's protection against cruel and unusual punishment. The Board has deliberately ignored the requirements that guards be stationed in the dormitory units at night. Had the Board proceeded with alternatives such as sallyports or catwalks, it could be credited with a good faith effort to comply with the order. All too typically, however, such alternatives are mere talk. The random shakedowns conducted by defendants have not eliminated weapons in the prison population. The recommendation of the Legislative Prison Task Force that metal detectors be installed to check prisoners has not yet been acted upon. These failures are just additional evidence of the managerial incompetence of the Board and its staff, including the Commissioner, Deputy Commissioner and a good number of its wardens. The present correctional staff provide custody but not security. Considering the other existing conditions, such a prison system is not constitutionally acceptable.

* * *

Time does not stand still, but the Board of Corrections and the Alabama Prison System have for six years. Their time has now run out. The Court can no longer brook non-compliance with the clear command of the Constitution, represented by the orders of the Court in this case. Plaintiffs are entitled to prompt and effective relief. Living conditions that constitute an imminent danger to health; inadequate medical care that poses a threat to life; and insufficient security

> that sanctions the law of the jungle — these facts describe a state of emergency demanding decisive action. It is clear that the Board of Corrections is incapable of effective leadership. Difficult as the Board's position was made by the lack of adequate funding, the Court finds that the Board could have ameliorated the conditions confronting it, but instead contributed to the gravity of the situation by its indifference and incompetence. *Newman v. Alabama,* 466 F. Supp. 628, 629-635 (M.D. Ala. 1979).

The defendants' Petition is obviously incorrect when it asserts that the findings in *Pugh* were limited to the conditions extant in 1976. Pet., p. 10. The decision below in the current case specifically held that "[t]he judge's findings and conclusions [in *Pugh*] therefore covered the conditions in the Alabama prisons at the time of the incident upon which the current action is based". *Williams v. Bennett,* 689 F.2d 1370, 1375 (11th Cir. 1982) (App. 8a - 9a).

Prior to the stabbing of the plaintiff on January 10, 1978, all of the defendants in this action knew of the findings and remedial orders entered in *Pugh v. Locke, supra.* (Tr. 267-268, 374, 376, 108-109, 390, 398, 400). As the Court of Appeals noted "[a]ll of the current defendants — with the exception of the warden, deputy warden, captain and assistant captain of the guards at Holman Prison — or their predecessors in office were named defendants in the *Pugh* litigation". *Williams v. Bennett,* 689 F.2d 1370, 1382 (11th Cir. 1982) (App. 31a.). As to the four defendants herein who were not named as defendants in *Pugh,* the Court of Appeals determined that they "were nevertheless bound by the injunction as 'agents, employees, successors in office or any others acting in concert with the named defendants". *Id.* at n.13 (App. 31a, n.13).

The defendants in the current case were aware that they had never complied with the Constitutional standards set

forth in *Pugh* or provided the plaintiff and other inmates at Holman with reasonable protection from violence. (Tr. 111-112, 268, 130-132). They were also aware that the stationing of guards in and around the dormitories would deter violence of the sort which left the plaintiff a quadriplegic. (Tr. 255-256, 263-264, 256, 269, 146, 147, 149, 313-314, 316, 276, 127). More specifically, they knew that if they had stationed one guard on the inside and one guard on the outside of the Holman dormitory there was a substantial likelihood that they could have prevented the stabbing of the plaintiff. (Tr. 254, 128, 149, 317-318). Indeed, the assailant himself admitted that he was looking for guards as far away as in the hallway outside the dormitory because he feared that they might see him kill the plaintiff. (Tr. 350-351). Only after he assured himself that there were no guards in or around the dormitory did he attack the plaintiff. (Tr. 350-351).

The petitioners are incorrect in their description of the decision of the Court of Appeals. That decision did not impose any automatic liability on the defendants in this action because of the judgment in *Pugh*. The Court of Appeals "conclude[d] that *Pugh* has no preclusive effect on the issue of individual constitutional wrongdoing". *Williams v. Bennett, supra* at 1383. (App. 34a). The decision examined the preclusive effect of *Pugh* on three discrete issues.[4] These issues were:

> a. Whether the conditions and practices in Holman Prison were cruel and unusual? *Id.* at 1382. (App. 30a).

[4]On a fourth issue involving the availability of a qualified immunity or a good faith defense, the Court of Appeals precluded further litigation but not because of the doctrine of collateral estoppel. *Williams v. Bennett, supra* at 1386. (App. 43a - 44a). Since this issue does not involve collateral estoppel, it is discussed in a separate section of this Brief. See page 19 hereinbelow.

b. Whether the conditions and practices in Holman Prison proximately caused the plaintiff's injuries? *Id.* at 1384-1385 (App. 38a - 40a).

c. Whether each individual defendant "exhibited 'deliberate indifference' which was a producing cause of the Eighth Amendment violation"? *Id.* at 1382-84 (App. 31a - 38a).

On the first two issues, the Court of Appeals held that the defendants were collaterally estopped from further denial and litigation. On the third issue, however, the decision below clearly held that the defendants were not estopped from further denial and litigation. After noting that the plaintiff must prove "deliberate indifference" in order to establish individual liability for cruel and unusual punishment, the Court held that "*Pugh* does not estop each of the current defendant officials from attempting to establish that he did not exhibit such deliberate indifference". More specifically, it held that:

> The critical causation issue here must be whether each individual defendant was in a position to take steps that could have averted the stabbing incident at Holman but, through callous indifference, failed to do so. Resolution of this issue necessarily entails a very individualized approach, taking into account the duties, discretion and means of each defendant. *Id.* at 1384 (App. 36a).

On this point, the Court of Appeals did not collaterally estop or preclude the defendants from further litigation.

The defendants' Petition to this Court is also incorrect when it asserts that *Pugh* "did not require or expect immediate compliance and established procedures to stay abreast of the progress being made toward compliance". Pet., p. 5. First, there is nothing within *Pugh* which supports the notion that it did not "require or expect immediate compliance" with its injunctive orders. The findings and con-

clusions entered on February 2, 1979 by Judge Johnson demonstrated that the defendants failed to satisfy the 1976 injunctive requirements in *Pugh* throughout the 1976-1978 period of time. *Pugh v. Locke,* 466 F. Supp. 628 (M.D. Ala. 1979). Secondly, even assuming that the defendants' contention is correct, the Court of Appeals decision below did not accord any preclusive effect to the *Pugh* injunction. *Williams v. Bennett, supra* at 1386-87 (App. 45a - 47a). The Court of Appeals spoke directly to this subject:

> Before closing our discussion of collateral estoppel, we find it necessary to comment on the distinction between the findings of the district court in *Pugh* and its subsequent injunction. *Pugh* has a preclusive effect on the present case because its findings established that the conditions at the prison constituted cruel and unusual punishment in violation of the eighth amendment at the time Williams was assaulted. Because the failure to maintain the prison in countenance with the constitution violated Williams' right to be free from cruel and unusual punishment, Williams need not prove that he was the victim of a constitutional violation. The obstacle now facing Williams is the attachment of legal responsibility for his injuries to one or more of the defendants. This will require proof of callous indifference.
>
> Nevertheless, a defendant may not avoid liability by relying on the timetable seen as having been incorporated in the district court's injunction in *Pugh*. Having made his findings in *Pugh,* the district judge may well have contemplated that a considerable period of time would be necessary to correct the deficiencies in the Alabama prisons. See 406 F. Supp. at 332. Defendants in this case appear to have successfully argued that they could not have been guilty of any wrongdoing in continuing unconstitutional conditions as long as the conditions were corrected within the time allowed by the *Pugh* injunction. This simply is incorrect. The district judge in *Pugh* did not undertake to amend the

constitution by suspending it for a certain period of time. The fact that the court did not require correction of the conditions by immediate mandatory injunction, does not absolve the state or the individual defendants of liability for constitutionally related injuries arising in the interim. Time given in an injunction is no license to exercise callous indifference for awhile. Although contempt may be avoided during this time, the possibility of liability continues to exist. Indeed, even in the absence of the *Pugh* case, an inmate who could prove injury resulting from unconstitutionally cruel and unusual punishment would have a viable cause of action. No one is permitted to violate the constitution until a judge has found the violation to exist, and, where one has been found to exist, no one is entitled to continue unconstitutional action, free of liability, until the time set in an injunction for its correction. It is the findings of unconstitutionality in *Pugh* which is relevant to the present case, not the correction time limits included in the *Pugh* injunction. *Id.*

REASONS FOR DENYING THE WRIT

I. Collateral Estoppel Was Denied By The Court Of Appeals On The Issue Of Individualized Responsibility

The defendants' Petition to this Court mischaracterizes the holding of the Court of Appeals. The holding below did not collaterally estop or otherwise preclude the defendants in this action from contesting their individual liability for the injuries incurred by the plaintiff. *Williams v. Bennett, supra* at 1382-84 (App. 31a - 38a). To the contrary, the Court of Appeals left this issue open for the jury to decide when the case is retried on remand. The Court of Appeals carefully considered the standards applicable to the offensive use of collateral estoppel set forth in *Parklane Hosiery v. Shore,* 439 U.S. 322, 99 S. Ct. 645, 58 L.Ed. 2d 552 (1979), and concluded that it *should not be used* to

estop the defendant "on the issue of individual constitutional wrongdoing". *Williams v. Bennett, supra* at 1383 (App. 34a). The Court of Appeals plainly held *in the petitioners favor* on the very issue they now describe as "reckless" and "shocking". In the Court of Appeals' own words:

> . . . it is clear that *Pugh* did not resolve the state of mind or intent of any particular one of the current defendants in failing to perform acts within his official responsibility. Hence one of the prerequisites of collateral estoppel, identity of these issues in the prior and subsequent action, is missing here. The district court's comments in *Pugh* addressed the corporate fault of the state officialdom with responsibility for operation of the Alabama penal system, not the existence of individual fault on the part of each of — or any one of — the current defendants. The latter focus is critical here. *** *Such matters remain to be litigated.* Accordingly, we conclude that *Pugh* has no preclusive effect on the issue of individual constitutional wrongdoing. Our examination of the *Pugh* litigation convinces us that the causation element in that case is not identical to the causation requirement at issue here. *** [W]hen individuals are being sued in individual capacities for damages for personal injuries, the causation inquiry must be more refined and focused than that undertaken in *Pugh*, where only declaratory and injunctive relief were sought for constitutional violations pervading an entire prison system. *** By contrast, the critical causation issue here must be whether each individual defendant was in a position to take steps that could have averted the stabbing incident at Holman but, through callous indifference, failed to do so. Resolution of this issue necessarily entails a very individualized approach, taking into account the duties, discretion and means of each defendant. *Id.* at 1383-84 (App. 35a - 36a). (emphasis supplied).

The defendants' Petition never mentions the fact that the Court of Appeals ruled in their favor on the critical

issue of "individualized causation". It is, of course, true that the decision below did estop the defendants from denying that the conditions of confinement in Holman Prison are cruel and unusual and that these conditions contributed to the plaintiff's injuries. Since the only defendants in this case are individual defendants sued in their individual capacities, however, the critical issue for their personal liability was not foreclosed by this aspect of the decision below. The Court below distinguishes:

> . . . between the individualized causation requirement (proof that a defendant contributed to the unconstitutional prison conditions), and the more generalized causation requirement (proof that the unconstitutional prison conditions contributed to Williams' injuries). Although the former remains to be litigated with respect to each individual defendant, the latter was litigated effectively in the prior suit. *Williams v. Bennett, supra* at 1384 (App. 38a - 39a).

When viewed free from the exaggerated alarm of the defendants' Petition, the decision below clearly took a middle road which accommodates the competing demands of remedying cruel and unusual punishment on the one hand and chilling the exercise of responsibility by public officials on the other. The Court of Appeals imposed the preclusive effect of estoppel on two issues but refused to impose such effect on the third, and most crucial, issue. In doing so, the Court carefully applied the standards of *Parklane Hosiery v. Shore, supra.*

The defendants' contention to the contrary cannot be squared with the plain language of the holding below. The petitioners quarrel with two points of the Court of Appeals' decision. First, it contends that it is "unfair" to collaterally estop it from contesting the cruel and unusual nature of confinement in Holman Prison because the issues in the case were not "identical" in terms of the capacities

of the parties and the relief that was sought. Each of the grounds for this contention in the Petition, however, were considered by the Court below. *Williams v. Bennett, supra* at 1382 (App. 30a - 32a). In response to the same contentions raised in the Petition, the Court of Appeals said:

> We do not perceive an unfairness in estopping the defendants' relitigation of the Eighth Amendment issue. All of the current defendants — with the exception of the warden, deputy warden, captain, and assistant captain of the guards of Holman — or their predecessors in office were named defendants in the *Pugh* litigation. In light of the serious constitutional violations alleged and the broad declaratory and injunctive relief sought in *Pugh*, the defendants had every incentive to litigate the Eighth Amendment issue fully and vigorously. The journey of the case through the appellate courts evidences the fact of their vigorous defense. See, *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part sub nom, Alabama v. Pugh*, 438 U.S. 781, 98 S. Ct. 3057, 56 L.Ed. 2d 1114 (1978). Moreover, there are no procedural opportunities in the present case that were unavailable to the *Pugh* defendants and of a kind that would be likely to alter the resolution of the Eighth Amendment issue. *Id.* at 1382 (App. 30a - 32a).

The petitioners' contention that the Court of Appeals did not correctly consider whether this case is "identical" to *Pugh* ignores the fact that this was the very reason that the Court did not collaterally estop the issue of individualized causation. On that issue, the Court of Appeals found that this case and *Pugh* did not involve identical considerations. However, on the issues of whether the conditions of confinement were cruel and unusual and whether such conditions contributed to the plaintiff's injuries, the Court below found the requisite "fairness" to impose the preclusive effect of collateral estoppel. The careful balancing of the

considerations of "fairness" by the Court below is apparent on the face of its treatment of these three discrete issues.

Secondly, the defendant contends that the decision below conflicts with the approach taken in several other Circuits and in the predecessor of the Eleventh Circuit.[5] The defendants' own argument, however, admits that use of collateral estoppel "should depend on the *fairness of applying the doctrine in the context of the particular fact situations*". Pet., p. 9. (Emphasis supplied by petitioner). Each of the cases cited by the petitioners do not involve conflicting legal principles but only different factual circumstances. The mere existence of differing factual circumstances which cause opposite results to be reached when identical legal principles are applied is not sufficient to invoke review by certiorari. Such differences are exactly what this Court intended when it vested discretion in the lower courts[6] in applying the preclusive effect of collateral estoppel in *Parklane Hosiery*. The cases cited in the Petition as "conflicting" are consistent with the current case in the legal principles recognized and applied.

For these reasons, the defendant has failed to present any legitimate reasons for the granting of its Petition in regard to the issue of collateral estoppel. The court below correctly followed the legal principles so recently addressed in

[5]In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) the Eleventh Circuit adopted as precedent all former Fifth Circuit cases submitted or decided prior to October 1, 1981. In *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982), the court held that Unit B panel or en banc court decisions of the former Fifth Circuit also are binding precedent in the Eleventh Circuit.

[6]It is no answer that *Parklane Hosiery* vested such discretion in the district courts in the first instance. The mere existence of discretion in the district courts "hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review". *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416, 95 S. Ct. 2362, 2371, 45 L.Ed. 2d 280 (1975). The appellate courts must review such discretion and correct its abuse whenever the district court fails to properly apply the standards set forth in *Parklane Hosiery*. That is exactly what the court below did.

Parklane Hosiery and there is no conflict in the application of these principles in the various Circuits.

II. Preclusion Of Qualified Immunity By Objective Knowledge Of The Holding In *Pugh*

The defendants continue their mischaracterization of the decision below by arguing that the Eleventh Circuit has misapplied the "objective test" of *Harlow v. Fitzgerald,* 102 S. Ct. 2727 (1982). The defendants' Petition admits that "the Eleventh Circuit acknowledged the ruling in *Harlow* that under the objective test defendant government officials would be shielded from liability for civil damages if their conduct did not 'violate clearly established statutory or constitutional rights of which a reasonable person would have known' ". Pet., p. 14. They complain, however, that the court below "ignored the pleading and proof requirements implicit in the *Harlow* decision". They ask for the right to "at least assert" the qualified immunity defense. Pet., p. 15.

No court has prevented the defendants from "at least asserting" the qualified immunity defense. When they asserted it in a Motion for Summary Judgment in this case in 1979, Judge Johnson denied the Motion on the basis of both the objective and subjective prong of the qualified immunity defense. On the "objective test" of such defense, Judge Johnson held:

> Defendants can no more successfully evade the first exception to the qualified immunity defense as a matter of law. The stabbing which paralyzed plaintiff occurred two years after the Court's Order in *Pugh v. Locke,* 406 F. Supp. 318 (M.D. Ala. 1976). It therefore cannot be argued that, in 1978, defendants were unaware that constant exposure to violence and threats of violence undermine a prisoner's Eighth Amendment rights. It follows under *Wood v. Strickland* that if defendants understood the constitutional norm, they are

> stripped of any immunity. See *Procunier v. Navarette*, 434 U.S. at 562. Thus, it also follows that summary judgment must be denied to the defendants in their individual capacities. (R. 62).

In their Answer to the Complaint the defendants did not plead qualified immunity as a defense as required by F. R. Civ. P. 8 (c).[7] Neither did they identify any qualified immunity or "good faith" defense during the discovery process prior to trial.[8] From all appearances the defendants had abandoned the qualified immunity defense after their Motion for Summary Judgment was denied in 1979. Nevertheless, at the close of trial in December, 1980, the defendants attempted to reassert such immunity. By this time, Judge Johnson had been elevated to the Eleventh Circuit and the case was being tried before District Judge Truman Hobbs. Judge Hobbs once again carefully considered the assertion of a qualified immunity by the defendants and then held, *on the basis of all the evidence at trial*, that such defense should not be presented in the instructions to the jury because the defendants knew or should have known that *Pugh v. Locke, supra*, had clearly established the plaintiff's constitutional rights and had clearly established that refusal to provide the reasonable protection from violence mandated in *Pugh* violated such rights. (Tr. 1236).

On appeal, the Court of Appeals confirmed Judge Johnson's and Judge Hobbs' view that the defendants could not assert a qualified immunity because *Pugh* had specifically

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[7]The defendant officials moved the court for allowance of an Amendment to their Answer to add a "good faith" affirmative defense and a "lack of money" defense. (R. 226). That Amendment was never allowed by the district court as required by Federal Rule of Civil Procedure 15.

[8]The plaintiff served interrogatories on the defendants requesting, *inter alia*, disclosure of their defenses, the facts supporting each such defense and the evidence which would be used to prove such facts at trial. (R. 70-74). The defendants eventually answered the interrogatories. (R. 116, 173, 176, 181). In their answers the defendants did not disclose "good faith" as a defense or assert any other affirmative defense.

put these particular defendants on notice that the conditions and practices at Holman Prison, including the practice of placing inmates in unguarded dormitories, constituted cruel and unusual punishment. The Eleventh Circuit's reasoning on this point conforms *exactly* to the standards of *Harlow*.

> To the extent that good faith is defined essentially in objective terms, if defendants should have known that their conduct in maintaining an unconstitutional prison violated Williams' rights, then their good faith defense will be defeated. In the context of the present case, the *Pugh* order not only clearly defined the constitutional rights of the Alabama prisoners, but also served to put the defendant officials on notice of the continuing violations. As the court stated in *Pugh*:
>
> > In *Wood v. Strickland*, 420 U.S. 308, 95 S. Ct. 992, 43 L.Ed. 2d 214 (1975), the Supreme Court held that, under Section 1983, plaintiffs can recover money damages from state officials if the officials acted either in bad faith or in 'disregard of settled, indisputable law'. *Id.* at 321, 95 S. Ct. 992. To put it another way: a public official may be held liable where he, in subjective good faith, acts in disregard of a person's 'clearly established constitutional rights'. *Id.* at 322, 95 S. Ct. 992. The Court now acts in these cases with a recognition that prisoners are not to be coddled, and prisons are not to be operated as hotels or country clubs. However, this does not mean that responsible state officials, including the Alabama Legislature, can be allowed to operate prison facilities that are barbaric and inhumane. Let the defendant state officials now be placed on notice that failure to comply with the minimum standards set forth in the order of this Court filed with this opinion will necessitate the closing of those several prison facilities herein found to be unfit for humane confinement.

406 F. Supp. at 331 (emphasis added). Thus, defendants are precluded from now asserting that they should not have known that failure to meet the constitutional norms established in *Pugh* would violate Williams' constitutional rights. Although this is not preclusion in the sense that the good faith defense was litigated in the earlier suit, the determination of a constitutional violation in *Pugh* effectively precludes the defense because of the court's clear delineation of the prisoner's rights.

In precluding the assertion of a good faith defense by an individual defendant, however, we do not disallow the admission of evidence demonstrating the subjective intent of a defendant. As discussed above, a claim alleging a constitutional deprivation of cruel and unusual punishment requires proof of deliberate or callous indifference on the part of each defendant. The focus of this inquiry necessarily centers on individual motives and reactions. Moreover, evidence tending to prove deliberate or callous indifference is the same evidence which would have been used to defeat a good faith defense under the subjective criteria. [citations omitted]. Because of the required proof of deliberate or callous indifference, therefore, the subjective good faith and intent of the individual defendants remain relevant even in light of the objectivity now associated with the good faith defense. *Williams v. Bennett, supra* at 1385-86. (App. 41a - 45a).

It would make a mockery of the Eighth Amendment and § 1983 to allow these defendants to assert before a jury that they could not be expected to know that housing the plaintiff in an unguarded dormitory in Holman Prison constituted cruel and unusual punishment. They were told *exactly that* in *Pugh v. Locke* by the district court. That decision was affirmed in relevant part at every appellate stage. The defendants in the current case admitted at trial that they knew of the holding to that effect in *Pugh*. (Tr. 109, 267-268, 374, 376, 108-109, 390, 394, 398, 400). They

also admitted that they knew that they had never complied with the requirements of *Pugh* and that they continued to house the plaintiff and other inmates in unguarded dormitories after they were enjoined from doing so. (Tr. 111-112, 268, 130-132).

The defendants' knowledge of the Constitutional norms established in *Pugh* for Holman Prison was not limited merely to the extensive findings and injunctive remedies that were entered. As pointed out by the Court below, *Pugh* included a specific warning from Judge Johnson that money damages could be recovered from the public officials who allowed an inmate to be subjected to the "barbaric and inhumane" conditions found at Holman Prison. Those public officials who received that notice in *Pugh* are the same ones who are now defendants in the current case. *Williams v. Bennett, supra* at 1382 and n.13 (App. 31a). A more perfect form of prior notice to public officials that their specific actions constitute cruel and unusual punishment cannot be found.

III. Jury Instruction On The Source Of Payment Of Any Judgment

The defendant contends that the district court was merely attempting to correct an erroneous impression left by the plaintiff's attorney on the source of payment when it instructed the jury that the individual plaintiff would have to pay any judgment themselves and that the State of Alabama would never have to pay any amount for them. The defendant does not cite any part of the Record for this proposition. The reason is apparent. There is nothing in the Record which supports it. The plaintiff's attorney never made any argument to the jury that the State would have to pay any judgment rendered against the individual defendants and the district court never stated that it was in-

structing the jury to the contrary in order to correct such an argument.

Moreover, the defendants never made the argument that it now makes during the proceedings in the Court of Appeals. In their Brief in the Court of Appeals the defendants argued that the instruction on source of payment was given "[i]n order to explain dismissal of the suit against the defendants in their official capacities. . . ." Def.'s Br. in 11th Cir., p. 46. They never even hinted in their written or oral arguments in the Eleventh Circuit that the district court gave the challenged instruction on source of payment in order to correct prejudicial remarks of the plaintiff's attorney on such subject. Having failed to raise the argument in the Court of Appeals, they should not be permitted to challenge the decision below on such grounds.

Even if the argument had been raised below, it has no merit. Two wrongs do not make a right. A district court cannot correct an erroneous comment of counsel by giving an erroneous instruction to the jury on the source of payment. The instruction to the jury that the state could never be made to pay any judgment rendered against the named individual plaintiffs was obviously in error for the reasons set forth in the opinion of the Court of Appeals. *Williams v. Bennett*, 689 F.2d 1370, 1391 (11th Cir. 1982). (App. 60a - 61a).

Neither does a district court have "discretion" to give an erroneous instruction to the jury. The defendants argue that the Court of Appeals failed to couch its holding in terms of an "abuse of discretion".[9] In making that argument, they state that "a trial judge [has] wide discretion in

[9]The defendants' Brief in the Court of Appeals did not argue that the "abuse of discretion" standard of review was applicable to jury instructions. Instead it argued that "the Court committed no error in instructing the jury with regard to the fact that the suit was against the defendants only in their individual capacities". Def.'s Br. in 11th Cir., p. 47.

determining *the manner and the language* he will use in instructing a jury". Pet., p. 18 (emphasis supplied). The Court of Appeals, however, did not reverse "the manner and the language" of the instruction. It reversed the legal substance of the instruction. *Williams v. Bennett*, 689 F.2d at 1391 (App. 60a - 62a). The district court does not have the discretion to give an instruction on a substantive legal principle which is erroneous as a matter of law. In such a circumstance, the abuse of discretion standard of review is inapplicable.

The defendants do not even bother to argue in their Petition to this Court that the contested jury instruction was substantively correct. Neither do they argue that the Court of Appeals' analysis of the substance of such instruction was incorrect as a matter of law. Instead, they prefer to argue that the Court of Appeals should have permitted the instruction to stand absent a finding that it was an "abuse of discretion" to give it. The Court of Appeals, however, found that the contested instruction was not only erroneous in its substantive content, but also "sufficiently prejudiced Williams to warrant reversal". *Id.* Even if the abuse of discretion standard were applicable, such an abuse was implicitly found by the Court of Appeals when it concluded that the instruction was legally erroneous and sufficiently prejudicial to warrant reversal. A district court which gives an instruction that tells the jury erroneous legal principles and causes prejudice to one of the litigants in doing so can be reversed even under the abuse of discretion standard of review.

CONCLUSION

This case is not one that should be reviewed by the Court. The Court of Appeals painstakingly followed the recent authoritative precedent laid down by this Court in *Parklane Hosiery* and *Harlow*. There is no conflict among the Circuits in the application of these authorities. Neither is there any aspect of the application of these authorities in the circumstances of this case which merits any further attention by this Court.

Respectfully submitted,

Robert L. Wiggins, Jr.
Suite 716 Brown-Marx Building
2000 1st Avenue North
Birmingham, Alabama 35203
(205) 252-4065

Attorney for Respondent

N. H. NEWMAN et al., Plaintiffs,

v.

STATE OF ALABAMA et al., Defendants,

United States of America, Amicus Curiae.

Jerry Lee PUGH, for himself and all others similarly situated, Plaintiffs,

v.

Larry D. BENNETT, Individually and in his official capacity as Commissioner of the Alabama Board of Corrections, et al., Defendants,

Barry E. Teague, United States Attorney, Amicus Curiae.

Worley JAMES et al., Plaintiffs,

v.

Larry BENNETT, Individually and in his official capacity as Commissioner of the Alabama Board of Corrections, et al., Defendants,

The National Prison Project of the American Civil Liberities Union Foundation, Inc., and Barry E. Teague, United States Attorney, Amici Curiae.

Civ. A. Nos. 3501-N, 74-57-N and 74-203-N.

United States District Court, M. D. Alabama, N. D.

Feb. 2, 1979.

Hearings were held to determine degree of compliance by Alabama Board of Corrections with orders in prior proceedings challenging conditions of confinement. The District Court, Johnson, Chief Judge, held that where despite lack of adequate funding in six-year period since original order the State Board of Corrections could have ameliorated conditions confronting

it but, instead, contributed to gravity of the situation by its indifference and incompetence and appointment of monitors offered little, if any, hope of swift compliance, such extraordinary circumstances dictated that the only alternative to noncompliance was appointment of the governor as receiver for the Alabama state prisons.

Governor appointed as receiver.

MEMORANDUM

JOHNSON, Chief Judge.

On October 4, 1972, this Court held that the failure of the Board of Corrections to afford the basic elements of adequate medical care to inmates in the Alabama Prison System constituted "a willful and intentional violation" of their rights under the Eighth and Fourteenth Amendments. *Newman v. Alabama*, D.C., 349 F.Supp. 278, 287. Four years later, when the Court issued its order in *Pugh v. Locke*, D.C., 406 F.Supp. 318 (1976), those same serious shortcomings persisted. What *Pugh* revealed, however, was that such shortcomings were endemic to every phase of the prison system's operation. The conditions of confinement then violated any judicial definition of cruel and unusual punishment. In September, 1978, hearings were held to determine the degree of compliance by the Board of Corrections with the *Newman* and *Pugh* orders.[1] The overwhelming weight of the evidence presented at that time established that what was true in 1972 and 1976 is still true today. While some progress has been made, the Board of Corrections has not in several critical areas achieved substantial compliance with the Court's orders. The very fact of confinement in Alabama's Penal System continues to contravene the Eighth and Fourteenth Amendment rights of plaintiffs.

The response of the Board of Corrections in 1976 was that the state legislature had failed to provide adequate funds.

[1]The findings and conclusions set forth in this memorandum are based upon the evidence presented at that hearing and the various reports filed with this Court by the plaintiffs, the amici and defendants.

Despite the clear command of the law that the state may not discount constitutional rights, the excuse of the Board remains that the legislature has been remiss. That excuse has no legal weight. It may be true that the legislature has failed to meet its constitutional responsibilities in this area. But what the evidence now so strikingly reveals is that even within funding limitations imposed by the legislature, the Board has failed to make a genuine effort at compliance. In area after area, the Board has made no serious attempt to determine what steps can be taken with present funds and to plan what can be accomplished with additional sums. The theme running throughout the evidence is a lack of professional leadership. The Court is compelled to conclude that there is no reasonable likelihood of effective cooperation and substantial compliance from the present Board of Corrections. The passage of three years since *Pugh* makes the need for comprehensive relief more urgent than ever.

I. OVERCROWDING

All institutions are in compliance with the requirement that the number of inmates not exceed the design capacity of the facility. This goal has only been achieved, however, by creating a backlog of 1,800 state prisoners in the city and county jails throughout Alabama. It is undisputed that the conditions in the county jails are worse than any that exist in the state prisons. Alabama's city and county jails were not designed to house long-term detainees. The evidence suggests that in almost if not every instance they fall below the minimum constitutional standards set forth in the *Pugh* order. Overcrowding is the norm. There is no classification system in the jails, with the result that offenders of all types are placed together. The jails are unsanitary and in a state of disrepair, and inspections have disclosed that many are serious fire hazards. Medical care is practically non-existent. In most jails, the prisoners receive no meaningful work, no programs, no exercise. Overcrowding in the prisons has been relieved only at the price of aggravated violations of the rights of state prisoners in the county jails.

The Board has presented no long-term plan to solve this problem. There were plans to build two 400-person facilities with the money from the 1977 bond issue. Indecisiveness, coupled with rising costs, makes it likely that only one can be built with that money now. In its comprehensive plan submitted to the Court on January 17, 1979, the Board proposes to construct four institutions, which will provide 1,700 additional spaces by 1981. Even accepting the Board's optimistic timetable, the problem of state prisons backed up in the county jails will not be ended. The Board's own projections indicate that there will still be almost 1,000 state prisoners in the city and county jails in 1981. And even that projection makes the questionable assumption that Fountain and Draper can be improved to meet minimum constitutional standards. This prospect of continued non-compliance with this crucial aspect of the Court's order requires further relief.

II. CLASSIFICATION

In 1976, all prisoners were classified, and a system of classification was developed. Since that time, the system has deteriorated and no longer functions in accordance with the Court Order. The experts attributed the problem to a lack of leadership and concluded that a replacement was necessary to run the program. The Court adopts that testimony. The classification staff at the institutions are not properly trained, have an insufficient understanding of the purposes of classification, and operate with no professional guidance. No handbook or guidelines have been provided for the staff's use. It is not surprising, then, that procedures have broken down and inconsistent standards are being applied. Often the initial classification decision is not made by a multi-disciplinary team composed of a psychologist, classification specialist, and correctional counselor, but by the "classification specialist" acting alone. The Central Review Board, in reviewing classifications, also does not meet as a team, and it, too, operates without written criteria. More seriously, classification decisions are dictated by the disciplinary system. Indicative is the fact that the

Central Review Board almost always reverses the institutional team when the warden recommends a higher custody classification. As a result, while the initial classification resulted in a determination that 700 prisoners should be classified "medium custody," the subsequent classification decisions by the Board have resulted in almost double that number being so classified. This development has had a detrimental impact on prisoners' access to jobs, activities, and programs. Indeed the classification system does not play its intended role in the assignment of institutional work. There, too, the recommendations of the wardens, none of whom are classification specialists, seem to be controlling. Meaningful classification has also been undercut by the continued employment of certain guidelines as absolute bars to pre-release or work-release programs. As a result, the highly successful Frank Lee Youth Center has had a vacancy rate of 30 to 50 out of 200 places despite the fact that there are hundreds of first-time offenders (for non violent crimes) at Draper and in the county jails who are potentially eligible for that program. Another result is that the current inmate population at Frank Lee, as in 1976, continues to be over 50 percent white, although the prison system population as a whole is predominantly black.

In addition to failing to maintain an adequate, ongoing classification process, the Board has failed to correct the "traumatic and stressful" conditions at its Kilby facility which render unreliable the initial testing and evaluation of new prisoners. The mingling of prisoners regardless of offense and propensity to violence, combined with the absence of security in the cellblocks and dormitories, is an invitation to violence of all kinds. One 18-year-old prisoner testified that he had been raped on four successive days during daylight hours while awaiting classification at Kilby. Effective and reliable classification of inmates, which in large part is the basis of the safety of all inmates, will not be achieved until these conditions are corrected. The problem is less one of money than of management.

III. MENTAL HEALTH CARE

In *Newman*, the Court found that the mentally ill, the disturbed, and the retarded were unidentified and were dispersed throughout the prison population without treatment. The evidence upon this submission reflects that nothing has been done to correct the situation. There is now some effort at identification of those with mental problems. But the record of housing and treatment of such persons is one of total failure and non-compliance. What defendants deem the best facility for housing those with severe emotional and mental problems is the same 12 cell area at Kilby that was in use at the time of this Court's original hearing. Many of those with mental problems at Fountain, Holman, and Tutwiler are housed in segregation cells and in punitive isolation. The consensus of experts was that these cells were unfit for the housing of persons with mental problems. Many of the mentally disturbed are simply left in the general population, where they are particularly vulnerable to harassment and assault. Indeed, of the mentally retarded, more have been placed at Fountain—the most violent of the institutions—that at any other place.

The Court's order provides that those who require treatment in mental institutions be transferred there. Defendants admit that it is virtually impossible for inmates to be transferred to facilities operated by the Department of Mental Health. In the last two years, only 46 persons have been transferred, and most have been returned within 30 days after having been put on medication but not having received treatment.

Non-compliance also exists as to the requirement that the Board hire adequate numbers of mental health professionals and support personnel. The Board employs no psychiatrist either full-time or as a consultant. There is only one licensed clinical psychologist. He spends 80 percent of his time at Kilby. The other staff listed as "psychologists" are not trained clinical psychologists and are not licensed to practice psychology. Even these "psychologists" provide almost no counselling. At Holman, the staff of five devotes a total of 55 hours

per week to counselling. At Tutwiler, there is no staff member available for counselling. Because of the lack of trained doctors, psychotropic medication is prescribed without proper supervision and controls.

As of May, 1978, there were no special programs or housing for the mentally retarded. Subsequently, 65 mentally retarded inmates were moved to a dormitory at Staton, and defendants indicate that they will be provided special education teachers. For the remaining identified mentally retarded inmates, the Board apparently has no program and no plan. Recently defendants have sought a federal grant to provide alcohol and drug counselling for inmates going into community release programs. But inspite of the evidence that 40 to 60 percent of the prison population abuses drugs, defendants in the last two years have afforded counselling for only a handful of prisoners.

In light of the clear mandate of the Court in this area, the minimal efforts at compliance by the Board reflect an attitude of deliberate indifference to the mental health needs of the inmate population.

IV. PROTECTION FROM VIOLENCE

Further, the Court concludes from the evidence that robbery, rape, and assault remain everyday occurrences among the general prison population in Alabama. The dormitories particularly are stall places of fear and violence. Defendants admit non-compliance with the requirement that guards be stationed in the living areas, including dormitories. The dormitories, they say, are too dangerous for the guards to enter. That fear is well taken. The number of reported incidents of prosecutable crimes of violence shows a steady increase over the last four years. And it is axiomatic in the prison setting that the number of unreported crimes far outnumbers those which are reported.

The Board has not taken the first steps to curb this pattern of violence which makes a mockery of the Eighth Amendment's protection against cruel and unusual punishment. The Board has deliberately ignored the requirement that guards be

stationed in the dormitory units at night. Had the Board proceeded with alternatives such as sallyports or catwalks, it could be credited with a good faith effort to comply with the order. All too typically, however, such alternatives are mere talk. The random shakedowns conducted by defendants have not eliminated weapons in the prison population. The recommendation of the Legislative Prison Task Force that metal detectors be installed to check prisoners has not yet been acted upon. These failures are just additional evidence of the managerial incompetence of the Board and its staff, including the Commissioner, Deputy Commissioner and a good number of is wardens. The present correctional staff provide custody, but not security. Considering the other existing conditions, such a prison system is not constitutionally acceptable.

V. LIVING CONDITIONS

The evidence indicates some improvement in the general level of cleanliness in the dormitories and food service areas. Toilet articles are now supplied to all prisoners, as are clean bed linen and towels. The Board does not, however, provide adequate clothing. Underwear and socks are not provided at all, and, at Fountain, trousers are not furnished. These failings pale alongside those concerning the general sanitary and safety conditions in the prisons. In *Pugh*, this Court found that Alabama's penal institutions were "filthy." While there has been improvement, the evidence reflects that each of the major institutions fall far below all minimum health and safety standards. It is not necessary to recite in detail what plaintiffs' expert, a United States public health officer, found when he toured Draper, Fountain, Holman, and Kilby again after two years. The Court credits his testimony now as it did then. Fountain and Draper continue to be "unfit for human habitation." At both institutions, lighting, ventilation, and heating remain inadequate. The living and food preparation areas are infested with vermin and rodents. Fire safety is non-existent. After two

years, many flammable mattresses remain in use,[2] guards have not been trained in evacuation, and fire fighting equipment is lacking. The food service at both prisons offers striking evidence of mismanagement. Food service personnel remain untrained, garbage is not properly handled, and equipment is not maintained.

The other institutions reveal similar problems. At Holman, lighting and ventilation remain unchanged. Temperatures in the living areas last winter were as low as 50 degrees. Fire safety also remains a problem. Indeed, flooding of the basement utility room has caused major electrical shortages and raises a serious risk of explosion. The roof and windows leak, posing a health hazard to inmates who must live and sleep in damp surroundings. The same public health problems exist at Kilby. At Tutwiler, these shortcomings are compounded by what the State Fire Marshall deemed a "major hazard to life and property" from the overloaded and deteriorated electrical system.

While a final solution to these problems awaits adequate funding by the legislature, the Court has not been presented with evidence of that kind of improvement which could be expected from diligent management alone. Where the prison living conditions still pose an imminent danger to the health of inmates, the Board has not achieved compliance with minimum constitutional requirements.

VI. FOOD SERVICE

As the discussion of living conditions suggests, food service is not in substantial compliance with the Court order. Inmates are now served three meals a day, and kitchen conditions have improved. But food is not prepared under conditions that meet minimum public health standards; equipment is not maintained in good working order; kitchen employees are not ade-

[2]The Alabama Board of Corrections' "plan" to acquire mattresses that meet the fire code requirements is to purchase them from the North Carolina prison system, which system—with prison labor—makes them.

quately trained; and food distribution to inmates in single cells remains essentially unchanged since 1976.

VII. EDUCATIONAL, VOCATIONAL, WORK, AND RECREATIONAL OPPORTUNITIES

The Board has failed completely to provide meaningful work for all inmates. Idleness is prevalent throughout the system. Institutional work assignments are few and most take only a small time to perform. The number of industry jobs has declined by twenty since 1976. Even the jobs in the tag plant are seasonal. Since the Prison Industries Division was created in 1977, only one new industry with merely 30 jobs has been started. The Division has formulated no concrete plans for the development of further industrial programs. Plans to open a canning plant in conjunction with the new Staton prison were eliminated by the Board, and Staton opened with no jobs available other than institutional work assignments. As this Court noted in *Pugh*, the lack of meaningful work contributes to boredom and frustration. Those in turn contribute to violence and mental and physical degeneration. The failure of the Board to address this central problem reflects against its inability to convert talk into action.

Vocational education and work-release programs have been expanded. But here, too, substantial compliance has not been achieved because of management problems. Of 736 total spaces, more than 100 are vacant at any given time. In March, 1978, CETA funds were forfeited because the Board refused to parole or place on work-release trainees within a short period after graduation. As in 1976, eligibility requirements for most programs are quite strict. The breakdown of the classification system contributes to non-compliance in this area as well.

VIII. PHYSICAL FACILITIES

The Board has complied with paragraph (2) of this section to the extent that it has established work-release and other

community-based facilities. But as the discussion of Living Conditions clearly reflects, Draper, Fountain, Holman, and Kilby do not meet all of the minimum standards of the United States Public Health Service. Therefore the Board is not in substantial compliance with this section.

IX. STAFF

The Board admits that it has failed to employ sufficient personnel as set forth in the Court's order. When Staton prison was opened, it was staffed with personnel drawn from the other institutions in the system. The total custodial staff is inadequate even under the revised staffing standards proposed by by amicus National Prison Project on December 11, 1978.

X. MEDICAL CARE

Six years after *Newman*, the Board is still not in substantial compliance with the order entered in that case. The evidence reflects small gains, but glaring inadequacies have yet to be corrected. The most significant deficiency is in the quantity and quality of the medical staff. Of 105 authorized positions for medical staff, only 51 are filled. The system employs no full-time psychiatrist. Only the medical director is a licensed physician, and he is not full-time. Otherwise, the system is provided medical care by two unlicensed physicians with the title "physician's assistant," one physician with a limited license, and one with a suspended license. In addition, the Board has contracted with a group of residents to provide 20 hours of care per week at Fountain and Holman and with another physician to provide 5 hours of care per week for Draper, Staton, and Frank Lee. The medical director for Alabama's Prison System testified that the system needed at least four additional full-time physicians. Likewise, there is a need for four additional R.N.'s. At the present time, only Kilby is served by an R.N. This situation reflects almost no progress since 1972. Dental care, too, is inadequate with but one full-time and one part-time dentist for the entire prison system.

Quotas have been assigned to each institution. The backlog of inmates waiting to see a dentist has resulted in care limited to extractions, with little or no rehabilitative work done. As previously indicated, mental care is non-existent.

No effort has been made to bring the Medical and Diagnostic Center at Kilby into compliance with the minimum Medicare standards as required by the Court. A lack of professionalism characterizes the administration of the prison hospital. Patients with different strains of hepatitis have been placed in the same ward at great risk to life. There is no hospital dietician and no medical records librarian. A laboratory technician has been serving as hospital administrator. These conditions amply reflect that the medical director has failed to comply with the order of the Court that he develop a program of continual evaluation of all facilities and all personnel. The delivery of medical care in the Alabama Prison System is not characterized by poor management, but by no management.

A general lack of supervision is evident with respect to other provisions of the *Newman* order. The medication distribution system is lax and record-keeping is poor. Evacuation plans and written sanitation procedures, if in existence, are not referred to and utilized. The medical facilities have not been regularly inspected by the Fire Marshall and the Health Department. While the experts who testified disagreed about the need for specific items of medical equipment, there is no dispute that what equipment is ordered arrives only after long delays. Emergency transportation to free-world medical facilities is often unreliable because of the lack of security personnel. And the simple task of preparing job descriptions has not been completed.

The natural consequence of this understaffing and inadequate supervision is the continued evidence of medical treatment performed by inmates. One inmate testified that he gave injections and performed a hemorrhoidectomy; another testified that he filled teeth and performed dental surgery, for guards as well as for inmates.

The cumulative effect of these deficiencies and abuses is a threat to life and limb that violates the Eighth Amendment. The Board of Corrections' continued non-compliance with the minimum constitutional requirements set down by the Court conclusively establishes that there is no reasonable likelihood of compliance in the near future from that quarter.

* * * * * *

[1, 2] Time does not stand still, but the Board of Corrections and the Alabama Prison System have for six years. Their time has now run out. The Court can no longer brook non-compliance with the clear command of the Constitution, represented by the orders of the Court in this case. Plaintiffs are entitled to prompt and effective relief. Living conditions that constitute an imminent danger to health; inadequate medical care that poses a threat to life; and insufficient security that sanctions the law of the jungle—these facts describe a state of emergency demanding decisive action. It is clear that the Board of Corrections is incapable of effective leadership. Difficult as the Board's position was made by the lack of adequate funding, the Court finds that the Board could have ameliorated the conditions confronting it, but instead contributed to the gravity of the situation by its indifference and incompetence. The lack of any significant progress since the original hearings in this case strongly suggests that the appointment of monitors offers little, if any, hope of swift compliance. The extraordinary circumstances of this case dictate that the only alternative to non-compliance with the Court's orders is the appointment of a receiver for the Alabama prisons. The Court will thus grant that relief, first requested by plaintiffs in June, 1978. Further injunctions or contempt proceedings will not accomplish the task of compliance; such remedies promise only confrontation and delay. When the usual remedies are inadequate, a court is justified in resorting to a receivership, particularly when it acts in aid of an outstanding injunction. *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976); *see, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1276, 28 L.Ed.2d

554 (1971); *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *Griffin v. County School Board*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964); *Turner v. Goolsby*, 255 F.Supp. 724 (S.D.Ga. 1966). There is, of course, a more extreme alternative to a receivership. In *Pugh*, the Court put defendants on notice that failure to comply with the minimum standards set forth in the order would necessitate the closing of several prison facilities. In light of that alternative, the more reasonable and the more promising approach is the appointment of Governor Fob James as receiver for the prison system.

[3] There can be no doubt that the paramount duty of the federal judiciary is to uphold the law. That is why, when a state fails to comply with the Constitution, the federal courts are compelled to enforce it. The habit that some states have fallen into of ignoring their responsibilities until they are faced with a federal court order is by now an all too well-known syndrome. The history of federal litigation in Alabama is replete with instances of state officials who could have chosen one of any number of courses to alleviate unconstitutional conditions of which they were fully aware, and who chose instead to do nothing. Consequently the federal courts time after time have been required to step into the vacuum left by the state's inaction. Regrettably, such orders result in the loss of some of the autonomy and flexibility the state might have exercised in the control of its public institutions had it chosen to accept the responsibility for their management before it was too late. That responsibility is one the Court will gladly relinquish to those who are elected to do it, if they are willing to undertake it. As this Court has publicly stated upon many occasions: "The Court looks forward to the day when responsible officials of the State of Alabama will assume their constitutional and legal obligations to run the state institutions in a manner that does not violate the Constitution and laws of the United States. Such a course of action would, of course, enable this Court to relinquish its substantial control of Alabama's governmental operations." By his petition to be ap-

pointed receiver, Governor James appears to have accepted that mantle of responsibility as far as the operation of the Alabama Prison System is concerned. Accordingly, an order will be entered appointing him receiver of the Alabama Prison System for the purpose of complying with the minimum requirements of the Constitution as embodied in this Court's previous orders.